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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 664

PAUL VERDIER,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, AND HONORABLE EDWARD P. MURPHY, A JUDGE THEREOF,

---

BRIEF STATEMENT OF THE CASE

On September 10, 1948, an original proceeding, in prohibition was commenced by Paul Verdier in the District Court of Appeal of the State of California, First Appellate District, Division Two, to restrain and prohibit the Superior Court of the State of California, in and for the City and County of San Francisco, and Honorable Edward P. Murphy, a Judge thereof, from proceeding or taking any further action under or in pursuance of a certain order made by said Superior Court and said Judge.

The order of said Superior Court referred to, and which was challenged by said proceeding in prohibition, was made by said Superior Court and Judge in an action for an "accounting", which was pending before that Superior

Court and Judge, in which action the Plaintiff Alexandrine Verdier filed her complaint against Defendant (Paul Verdier) for an "accounting" of the rents and income from a certain parcel of real property. Defendant Paul Verdier by various documents filed in said action, including his verified Answer, and his verified Answer and Cross-Complaint, denied the existence of any right on the part of said Plaintiff to any "accounting" from him, and alleged facts showing said Plaintiff to be without any right to such "accounting", to-wit: a complete defense to said action.

Said Superior Court, and Judge, without any trial or hearing of said action, or of said issue as to the alleged right of Plaintiff to any "accounting" from Defendant, and without any hearing, or the taking of any evidence or proof whatsoever on said disputed issue, and without requiring said Plaintiff to establish by evidence or proof, her right to any "accounting", and without affording to the Defendant (Paul Verdier) in said action any opportunity for any hearing, or to introduce any evidence on said disputed issue, made and entered its summary order, directed to said Paul Verdier, commanding him under penalty of contempt, to make and render and disclose to Plaintiff, upon his oath, on deposition, the relief (to-wit: the "accounting") sought by Plaintiff in her said action.

Said order of said Superior Court, not being an "appealable order" under the laws of the State of California, said Paul Verdier commenced said original proceeding, in prohibition, in said District Court of Appeal of the State of California.

The Petition of said Paul Verdier in said original proceeding in prohibition, set forth the facts as hereinbefore related, with respect to the action and order made by the said Superior Court and Judge, as aforesaid; and asserted and set forth as the ground upon which the Writ of Prohibi-

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tion should issue, that said order and action on the part of said Superior Court and Judge, constituted, and amounted to a "summary judgment" in favor of Plaintiff Alexandrine Verdier, and against said Paul Verdier; and that under the laws of the State of California said Superior Court was without authority, power or jurisdiction to make or render any "summary judgment" save and except in those specific cases and instances set forth and specified in and by the provisions of Section 437c of the Code of Civil Procedure of said State.

Said Section 437c of the Code of Civil Procedure of the State of California reads, as follows:

> "437c. (Summary proceedings on claim that action or defense is unmeritorious: Motion to dismiss complaint or strike out answer: Judgment on motion: Contents of affidavits: Order establishing right to partial recovery.) In superior courts and justices' courts of Class A and municipal courts when an answer is filed in an action to recover upon a debt or upon a liquidated demand including an action to enforce or foreclose a lien or mortgage to recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law or to recover possession of specific real or personal property or for specific performance of a contract in writing for the sale or purchase of property, or for an accounting arising on a written contract if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party, after notice of the time and place thereof in writing served on the other side at least ten days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the mo-

tion sufficient to present a triable issue of fact. A Judgment so entered is an appealable judgment as in other cases.

Contents of affidavits. The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto.

The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief.

Order establishing right to partial recovery. If it appear that such defense applies only to a part of the plaintiff's claim, or that any part is admitted, the court shall, by order, so declare, and plaintiff's claim shall be deemed established as to so much thereof as such defense shall not apply to, or as is admitted, and the cause of action may be severed accordingly, and the action may proceed as to the remainder of such claim. No judgment shall be entered prior to the termination of such action, but the judgment in such action shall, in addition to any matters determined in such award, award to plaintiff the amount of his claim so estab-

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lished by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases."

Upon the filing of said Petition for Prohibition in said District Court of Appeal, that Court forthwith made and issued its Alternative Writ of Prohibition directed against said Superior Court and Judge, restraining said Court and Judge from any further action or proceedings under or in pursuance of said order, until the further order of said District Court of Appeal; and commanding them to be and appear before said District Court of Appeal on the 11th day of October 1948, and show cause if any they had, why the Peremptory Writ should not issue against them.

On the return day (October 11, 1948), the calendar of said District Court of Appeal being very congested, the matter was submitted without argument.

Thereafter and on the 16th day of November 1948, said District Court of Appeal rendered its decision in said matter, denying said Petition for a Writ of Prohibition, and discharging the Alternative Writ theretofore issued. A copy of said Decision is appended hereto.

In its said Decision, said District Court of Appeal held and stated that the action and order of said Superior Court complained of, "has no resemblance whatever to the summary judgment under Section 437c Code of Civil Procedure". The said District Court of Appeal then proceeded in its decision to declare and state that the action and said order of said Superior Court and Judge, were authorized by the provisions of *Section 2021 of the Code of Civil Procedure of the State of California.*

In its said Decision, the District Court of Appeal, having thus disposed of the point and contention made by Petitioner Paul Verdier as to Section 437c of the Code of Civil

Procedure, it then proceeded to declare the authority and jurisdiction of the Superior Court and Judge to make and enforce the order complained of, under another and different section of the Code (viz: Section 2021 of the Code of Civil Procedure) in the following language:

> "The order as to petitioner.
>
> The petitioner contends that the order directing him to answer all questions, including those which go into the matter of the accounting proper, grants plaintiff the relief she seeks without any proof that she is entitled to it and exceeds the jurisdiction of the court as, in substance, it grants summary relief outside the scope of Section 437c Code of Civ. Procedure. The contention is without merit. An action for an accounting, as instituted herein, is a proceeding in equity for the purpose of obtaining a judicial settlement of the accounts of the parties in which proceeding the court will adjudicate the amount due, administer full relief and render complete justice (1 Cal. Jur. 167-169; 1 C. J. S. 662). Petitioner's complaint expressly prays judgment 'that defendant pay over to plaintiff all such monies as may be found to belong to plaintiff and for such other, further and different relief as, the premises considered, is proper.' The taking of a deposition is only a provisional measure intended to secure the evidence by which the justice of a litigant's claim or defense may be established (S. F. Gas and Electric Co. *v.* Superior Court, 155 Cal. 30, 35). It in no way disposes of the action itself or grants any of the final relief prayed for and therefore has no resemblance whatever to the summary judgment under Section 437c Code of Civ. Procedure.
>
> There can be no doubt that the court in this case had jurisdiction to order petitioner to answer all questions put to him including those pertinent to the accounting itself. Section 2021 Code of Civ. Procedure provides that in certain enumerated cases among which '1. When the witness is a party to the action', the deposi-

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tion of a witness in the state may be taken 'in an action at any time after the service of the summons or the appearance of the defendant.' It has been derived from these words that it is not requisite for a deposition to be relevant to an actual issue in the action, but that it is sufficient that it is pertinent to a potential issue (S. F. Gas and Electric Co. *v.* Superior Court, supra, at page 34; McClatchy Newspapers *v.* Superior Court, 26 Cal. (2d) 386, 395). With respect to the exact point here presented Most *v.* Superior Court, 25 C. A. (2d) 394, 398 states:

> "In the instant case, it is clear that the question of an accounting is raised as a potential, if not an actual, issue of fact, and such being the case, it is evident, upon the authority of San Francisco Gas & Elec. Co. *v.* Superior Court, supra, that Section 2021 of the Code of Civil Procedure is broad enough in its express terms to include the case now before us, and to confer upon the superior court the right to compel petitioner to answer questions pertinent and material to the possible issue of an accounting, which, under the pleadings, at least may arise."

Upon the rendition of said Decision by said District Court of Appeal, Petitioner Paul Verdier discovered and observed that said Court had rested its decision, and had sustained the act and order of the Respondent Superior Court and Judge, under a statute of California, (Section 2021 of the Code of Civil Procedure) which was neither raised nor discussed in his Petition for Prohibition.

Thereupon, and within the time prescribed by law, he filed in said District Court of Appeal, his Petition for Rehearing, wherein he urged and insisted that the construction and interpretation put upon said Section 2021 of the Code of Civil Procedure, by said District Court of Appeal in its said Decision, will be the construction and interpretation which must be accepted by the Federal Courts, if and when said Section 2021 is tested by the Federal Courts

under the "Due Process Clause"; and that the construction and interpretation thus put upon said Section 2021 by the Decision of said District Court of Appeal if allowed to stand, was such as to render said Section 2021 repugnant to the Due Process Clause. In said Petition for Rehearing, Petitioner urged upon said District Court of Appeal, as follows:

"Due Process of Law?

The deposition of Petitioner here, was taken under authority of the provisions of Section 2021 CCP. That section authorizes the taking of the deposition of any 'adverse party', and we concede the right of Plaintiff in the matter at bar to take a deposition of this Petitioner. We have not sought, and we do not seek to prevent *the taking* of Petitioner's deposition. We do however insist that upon the taking of that deposition, Plaintiff cannot by that device, compel the Petitioner to make disclosure to her of the facts and details of his business affairs and financial transactions, viz, to render to her the 'accounting', sought by her complaint unless and until Plaintiff has established, by evidence, and the Court has judicially determined the disputed preliminary issue of fact as to her legal right thereto. We point out that no provision or langauge is contained in, and no reasonable inference can be drawn from, the language used in said Section 2021, which confers any such right on a Plaintiff in an 'accounting' action, nor which imposes any such obligation upon the defendant in such an action. But the decision under consideration here holds, very definitely and positively, that Plaintiff does have such a 'right', and that the defendant has such an 'obligation' on a deposition taken under Section 2021. We submit that the interpretation placed upon any statute, by the Courts of the State, are binding upon the Federal Courts, and is the interpretation which must be accepted, if and when that statute is tested under the due process, and the equal protection clauses. We

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point out that if Section 2021 confers upon the Court, the right to summarily resolve disputed issues of fact (as to Plaintiff's right to any accounting from Defendant), in favor of the Plaintiff, and if it obligates the Defendant to make the disclosures on his deposition prior to, and without any judicial determination of that preliminary issue of fact, and if it confers upon the Court, either the power or the duty, to thereby deprive the defendant of his right to a trial, hearing and determination of that disputed issue of fact, then Section CCP 2021, is invalid and void, because in violation of the due process, and equal protection clauses.

Any statute or section which either authorizes, or obliges (as does the decision in question) any court, to resolve any disputed issue of fact in favor of a Plaintiff, and against a defendant, without requiring the Plaintiff to establish his case by evidence, and without affording the Defendant an opportuniy to present his evidence in relation thereto, is unconstitutional and void. Accordingly, the decision in question, if allowed to stand, will render CCP 2021, or at least the 'adverse party' subdivision thereof, invalid and void."

Thereafter, and on the 16th day of December 1948, said District Court of Appeal, made its order (without opinion) denying said Petition for Rehearing.

Thereafter, and on the 22nd day of December 1948, and within the time allowed by law therefor, Petitioner filed in the Supreme Court of California, (that being the Court of last resort in California) his Petition for a hearing and review of said Decision of said District Court of Appeal. In his said Petition for Hearing so filed in said Supreme Court of California, Petitioner alleged and set forth, as follows:

"Due Process of Law"

The deposition of Petitioner here, was taken under authority of the provisions of Section 2021 CCP. That

section authorizes the taking of the deposition of any 'adverse party', and we concede the right of Plaintiff in the matter at bar to take a deposition of this Petitioner. We have not sought, and we do not seek to prevent the taking of Petitioner's deposition. We do however insist that upon the taking of that deposition, Plaintiff cannot by that device compel the Petitioner to make disclosure to her of the facts and details of his business affairs and financial transactions, viz, to render to her the 'accounting', sought by her complaint unless and until Plaintiff has first established, by evidence, and the Court has judicially determined the disputed preliminary issue of fact as to her legal right thereto. We point out that no provision or language is contained in, and no reasonable inference can be drawn from, the language used in said Section 2021, which confers any such right on a Plaintiff in an 'accounting' action, nor which imposes any such obligation upon the defendant in such an action. But the decision under consideration here holds, very definitely and positively, that Plaintiff does have such a 'right', and that the defendant has such an 'obligation' on a deposition taken under section 2021. We submit that the interpretation placed upon any statute, by the Courts of the State, are binding upon the Federal Courts, and is the interpretation which must be accepted, if and when that statute is tested under the due process, and the equal protection clauses. We point out that if Section 2021 confers upon the Superior Court, the right to summarily resolve disputed issues of fact (as to Plaintiff's right to any 'accounting' from Defendant), in favor of the Plaintiff, and if it obligates the Defendant to make the disclosures on his deposition prior to, and without any judicial determination of that preliminary issue of fact, and if it confers upon the Court, either the power or the duty, to thereby deprive the defendant of his right to a trial, hearing and determination of that disputed issue of fact, then Section CCP 2021, is invalid and void, because in violation of the due process, and equal protection clauses.

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> Any statute or section which either authorizes, or obliges (as does the decision in question) any court, to resolve any disputed issue of fact in favor of a Plaintiff, and against a defendant, without requiring the Plaintiff to establish his case by evidence, and without affording the Defendant an opportunity to present his evidence in relation thereto, is unconstitutional and void. Accordingly, the decision in question, if allowed to stand, will render CCP 2021, or at least the 'adverse party' subdivision thereof, invalid and void."

On the 13th day of January 1949, said Supreme Court of California made its order (without opinion) declining to hear and review said Decision of said District Court of Appeal. Accordingly, the said Decision now appealed to the Supreme Court of the United States, is the decision of the highest court of the State of California, in which a decision could or can be had in the case.

Thereafter, and on the 16th day of January 1949, said Decision and judgment of said District Court of Appeal became final in the State of California.

The Federal Statutory Provision Authorizing This Appeal

The Federal Statutory provision authorizing this appeal is "Title 28 United States Code, Section 1257", the pertinent provisions of which are as follows:

> "1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) • • •
>
> (2) By appeal where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) • • •

The Provision of the Constitution of the United States Involved

The Federal Constitutional provision involved on this appeal, by reason of which the State Statute hereinafter set forth is claimed to be invalid and void, is the "Due Process" provision in the 14th Amendment to the Constitution of the United States, the pertinent substance of which is:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Statute of the State of California, the Validity of Which is Involved

The Statute of the State of California, which (as the same has been construed and interpreted by the Courts of the State of California) is asserted by this Appellant to be repugnant to said "Due Process" Clause, and the validity of which is involved on this appeal, is Section 2021 of the Code of Civil Procedure of the State of California, which is as follows:

> "Section 2021. (Deposition within state: Occasions authorizing.) The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:
>
> 1. When the witness is a party to the action or proceeding or an officer, member, agent, or employee of a corporation, or the agent or employee of a municipal corporation, which corporation or municipal corporation is a party to the action or proceeding, or an agent

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or employee of an individual who is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2. When the witness resides out of the county in which his testimony is to be used, or resides in the county but more than fifty miles distant from the place of trial or hearing by the nearest usual traveled route;

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend;

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause;

7. When the witness is a subscribing witness to a will, and the action is one to contest the will."

Subdivision 1 of said Section 2021, is the section particularly pertinent in this appeal.

The Date of the Decision and Judgment Appealed From

The decision of the District Court of Appeal of the State of California, which is appealed from, was dated and rendered on the 16th day of November, 1948; and said decision became final and effective on the 16th day of January 1949.

The Date of the Petition for Appeal

The Petition for appeal from said Decision of said District Court of Appeal, is dated and presented to the Honorable

Presiding Justice of said District Court of Appeal of the State of California, on the 28th day of January 1949.

The Judgment and Decision From Which This Appeal Is Taken, Is a Final Judgment

The Decision and Judgment from which this appeal is taken, was rendered by the said District Court of Appeal of the State of California, First Appellate District, Division Two, an intermediate Appellate Court, on the 16th day of November 1948. Under the law of California no appeal therefrom to the Supreme Court of California exists as of right. A hearing or review of said Decision and Judgment by said Supreme Court of California may be had only by leave and consent of said Supreme Court. A Petition for a hearing and review of said Decision in and by said Supreme Court was duly filed in said Court on the 22nd day of December 1948, and within the time prescribed by law; and said Petition for hearing was denied (without opinion) by said Supreme Court on the 13th day of January 1949.

Thereafter and on the 16th day of January 1949, to-wit, sixty days from and after the date said decision was rendered by said District Court of Appeal, said decision and judgment became final under the laws of California.

The Decision Sought To Be Reviewed Is By the Highest Court of the State of California In Which Decision Could Be Had

As hereinbefore shown, the Supreme Court of California acting within its right and power in the premises, declined and refused to grant a review or hearing of said Decision in said Supreme Court; accordingly, the said District Court of Appeal thereby became and was the highest Court of California in which a decision could be had in said case and proceeding.

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The Decision and Judgment Appealed From Was Rendered In a Suit Involving An Actual Case and Controversy

As appears from the Statement of the Case, hereinbefore set forth, said Prohibition proceeding was instituted in said District Court of Appeal, under its original jurisdiction, and presented a case and actual controversy between Petitioner therein (Appellant Paul Verdier) on the one hand, and the Respondents in said prohibition proceeding, (The Superior Court of the State of California in and for the City and County of San Francisco, and Honorable Edward P. Murphy, a Judge thereof) on the other hand. The particular controversy was with respect to the right, power and jurisdiction of said Respondent Court and Judge in an action for "accounting", wherein the defendant Paul Verdier had denied Plaintiff's right to such "accounting", and had pleaded facts constituting a defense to said action for "accounting", to make a summary order compelling said Defendant Paul Verdier, under penalty of contempt, to make and render the "accounting" sought by the complaint, prior to, and without any trial of the action, or of the disputed issue as to Plaintiff's right to any "accounting", and without any hearing or judicial determination of said preliminary issue, and without affording to such defendant any right or opportunity to any trial or hearing whatsoever on said issue, so raised by the pleadings as to Plaintiff's right to such "accounting". Said Paul Verdier, as the Petitioner in said prohibition proceeding urged and contended that such summary order was beyond and in excess of the power and jurisdiction of said Respondent Court and Judge; and said Respondent Court and Judge contended for the validity and propriety of such summary order.

Accordingly, an actual case, and controversy, was presented in said prohibition proceeding.

The Case Presents a Substantial Federal Question

The question to be resolved on this appeal is whether Section 2021 of the Code of Civil Procedure of the State of California, and particularly Subdivision 1 thereof, which has been construed and interpreted by the said District Court of Appeal of the State of California as conferring upon the Superior Courts (viz: the trial courts of general jurisdiction) of said State the right, power and jurisdiction, in actions for "accounting", wherein the Defendant has denied Plaintiff's right to such "accounting", and has pleaded facts constituting a defense to such action, to compel such Defendant, by summary order, to make and render to the Plaintiff, the "accounting" for which the action was brought and as sought by the complaint, without any trial of such action, or of the preliminary issue raised by the pleadings as to Plaintiff's right to such "accounting", and without any hearing or judicial determination of such preliminary issue, and without affording to such Defendant any trial or hearing or any right or opportunity to defend the same or to introduce evidence therein does, or does not, deny to such Defendant that "Due Process" guaranteed to him by the "Due Process" provisions of the 14th Amendment to the Constitution of the United States; and whether such State statute (Section 2021, Code of Civil Procedure of California) which, as construed and interpreted by said District Court of Appeal, confers such authority on said Superior Court, is or is not, invalid and void as repugnant to the provisions of said Federal Due Process Clause.

We respectfully submit that a substantial Federal Question is thus presented for consideration and determination by the Honorable Supreme Court of the United States.

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The Federal Question Sought To Be Reviewed Was Properly Raised and Preserved in the State Court

As shown in the Statement of the Case, hereinbefore, the decision appealed from was rendered in an original suit or proceeding in Prohibition, instituted in the said District Court of Appeal. Accordingly, the said District Court of Appeal was the "trial court" on said prohibition proceeding. In said suit or proceeding Petitioner therein (Appellant here) contended that a certain order made by a Superior Court and Judge, was invalid and void as in excess of power and jurisdiction, and its enforcement should be prohibited, because such order constituted a "summary judgment", was not authorized by the provisions of the "summary judgment statute" (Section 437c of the Code of Civil Procedure of California); and that such order was not authorized under said "summary judgment statute" for the reason that under that statute (Sec. 437c C.C.P.) no court was or is empowered to render any summary judgment in an action for "accounting", as against any defendant who has pleaded a defense thereto. However, in the said decision rendered by said District Court of Appeal, said Court after holding that the order complained of "has no resemblance whatever to the summary judgment under Section 437c Code of Civil Procedure", and that the order complained of was therefore not in violation of said section 437c of the Code of Civil Procedure, then proceeded to announce and declare (in language set forth verbatim at pages 6-7 ante) that Section 2021 of the Code of Civil Procedure of California conferred upon the Superior Court the power to make and enforce the summary order complained of. By that announcement and declaration, said District Court of Appeal introduced into the case, the theory and claim, wholly foreign to the claims and contentions in the Peti-

tion, that Section 2021 of the Code of Civil Procedure conferred upon the Superior Court, in actions for "accounting", the right, power and jurisdiction, to summarily decide important issues of fact raised by verified pleadings in an action, against a party to that action without any trial or hearing of such issue, and without affording the party against whom such summary decision was made, any right or opportunity to any hearing, or to offer or introduce any evidence in support of his defense, as pleaded in his verified pleadings; and that said Section 2021 conferred upon the Superior Court, the right, power and jurisdiction to disregard the rights of the Defendant, and to summarily award to the Plaintiff in an action for "accounting", the relief, (to-wit the "accounting") sought by the action, while at the same time summarily denying to the Defendant, any right or opportunity to any hearing on the issues raised by his verified pleadings, as to Plaintiff's right to such "accounting", and as to Defendant's obligation to render the same.

Said District Court of Appeal, (to-wit: the trial Court) by its decision having thus surprisingly introduced into the said prohibition proceeding pending before it, a point and theory wholly foreign to the Petition and the contentions made therein, Paul Verdier the Petitioner there (Appellant here) promptly, and within the time allowed by law, filed with said District Court of Appeal his Petition for Rehearing and reconsideration of said matter, and in his said Petition for Rehearing set forth and contended that the construction and interpretation placed upon said Section 2021 of the Code of Civil Procedure by said Court in its decision, would be the interpretation and construction which must be accepted by the Federal Courts when that statute (C.C.P. 2021) is tested under the Due Process Clause; and

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that such construction and interpretation if allowed to stand, would render said Section 2021 of the Code of Civil Procedure, or at least the "adverse party" subdivision thereof (subdivision 1 thereof) invalid and void as repugnant to the said Due Process Clause.

The exact language used by said Petitioner (Appellant here) in presenting said point is set forth at pages 8 *et seq.* of this Jurisdiction statement, reference to which is hereby made.

Accordingly, the proposition and theory that Section 2021 of the Code of Civil Procedure conferred upon the Superior Court of California, the right, power and jurisdiction to summarily compel a defendant in an "accounting" action, under penalty of contempt, to render the "accounting" sought by the complaint and action, without affording to that defendant any trial or hearing upon his defense pleaded to the action, or on the issue raised by his denial of Plaintiff's right to an "accounting" was thus introduced into the case by said declaration of said District Court of Appeal in its decision dated November 16, 1948.

As appears affirmatively from said Section 2021 of the Code of Civil Procedure, there is no language contained therein which by even a strained construction would appear to confer any such power or jurisdiction on the Superior Court, or on any other court. And the decisions of the Courts of California theretofore handed down in "accounting" actions, without exception indicated that in actions for "accounting" the regular, usual and proper procedure is for the trial court to first take the evidence on the question of Plaintiff's right, or lack of right, to have the information ("accounting") from Defendant; and if and when the Court, on the trial of that preliminary issue, concludes that Plaintiff *is* entitled thereto, then it is proper for the court

to make an interlocutory decree to that effect, and for the Court to designate a Referee to take the "accounting", or for the Court itself, if it prefers to do so, to proceed to the taking of the "accounting". Among the California cases so holding, are: *Stoll* v. *Selander*, 82 Cal. App. (2d) 186 (1947); *Patrick Farms Inc.* v. *Superior Court*, 13 Cal. App. (2d) 424 (1936).

Petitioner's first opportunity to raise the Federal Question with respect to said Section 2021 of the Code of Civil Procedure, arose upon the rendition of, and by reason of the language in, the said decision of said District Court of Appeal rendered on November 16th, 1948, as hereinbefore shown; and Petitioner in his said Petition for Rehearing in said Court, brought said question to the direct and immediate attention of said District Court of Appeal, in the language hereinbefore in this Jurisdiction Statement set forth.

Missouri v. *Gehner*, 281 U. S. 74, 79;
Brinkerhoff Co. v. *Hill*, 281 U. S. 673, 677, 678.

That Petitioner below (Appellant here) thereafter preserved and did not abandon or waive said point and contention as to said Federal Question, is demonstrated by the fact that in his subsequent Petition to the Supreme Court of California for a hearing and review of said Decision in that Court, Petitioner again presented said contention in the language set forth at pages 9 *et seq.* in this Jurisdiction Statement, reference to which is hereby made.

It therefore appears affirmatively, that said Federal Question was properly raised and presented to the said District Court of Appeal (which was the trial court in the matter), and the fact said Court did not either in its decision appealed from, or in its order denying the said Petition for Rehearing, discuss or refer to said Federal Question, does not

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deprive this Honorable Supreme Court of the United States of Jurisdiction on this Appeal.

International Harvester Co. v. *Missouri*, 234 U. S. 199, 206, 207;

Schuylkill Trust Co. v. *Pennsylvania*, 296 U. S. 113, 121-123.

And of course, the fact that the Supreme Court of California denied said Petition for hearing therein, without opinion, even though the Federal Question was presented in said Petition, does not operate to deprive this Honorable Supreme Court of the United States of jurisdiction on this appeal.

Accordingly, the Federal Question sought to be reviewed, was properly and timely raised, and was duly preserved, in the Courts of the State of California.

Conclusion

WHEREFORE, this Petitioner respectfully submits, that for the reasons hereinbefore assigned and set forth, the Honorable Supreme Court of the United States has jurisdiction on appeal, to review the said decision and judgment of said District Court of Appeal of the State of California, a copy of which said decision is appended hereto in accordance with the rule of this Honorable Court.

Respectfully submitted,

MORGAN J. DOYLE,
J. JOSEPH SULLIVAN,
Counsel for Appellant.

Dated: January 28, 1949.

Appendix "A"

NOURSE, P. J.:

This is a petition for a writ of prohibition to prevent respondents from proceeding further under two orders, the one directing petitioner under penalty of contempt of court to answer all questions put to him on the taking of a deposition in an action for an accounting instituted against him by Alexandrine Verdier, his wife, the other directing the taking of the deposition of the witness Verna Osborne in the same cause. The action for an accounting related to the rentals received by petitioner since July 22, 1938, from a certain real property at Vallejo and Taylor Streets in San Francisco alleged to be owned by plaintiff and defendant in joint tenancy. The taking of petitioner's deposition took place after the service of summons but before answer was filed. When, after introductory questions about his name, petitioner was asked when he acquired the property in question, petitioner's attorney made a statement to the effect that petitioner admitted that the parties since July 22, 1938, have been and they were coowners in joint tenancy of the property, that petitioner had leased the premises, received the rentals and had not paid any part of them to plaintiff and that he denied that plaintiff was entitled to any accounting. He further took the position that questions beyond the admissions made would go into the accounting itself, the prayer of the complaint, and instructed petitioner to answer no further questions until so instructed by the court. Accordingly petitioner did not answer any of the further questions asked. Later in his amended answer and cross-complaint petitioner's allegations were to the effect that although the property on July 22, 1938, was placed in the name of the parties as joint tenants it was community property acquired during marriage without any separate contribution of plaintiff and that the transfer made was not intended to change the holding from community property to joint tenancy, but was made for a stated purpose of convenience. Petitioner claimed to be entitled to the exclusive management and control of said community property. A deed of July 22, 1938, in which P. Verdier and wife granted the property to P. Ver-

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dier and wife as joint tenants was appended to the answer. After report of the refusal to answer and hearing in accordance with section 1991 Code of Civil Procedure the court ordered petitioner to answer all the questions put to him.

After petitioner's refusal to answer, a subpoena also issued to take the deposition of Verna Osborne, the then lessee of the property, based on an affidavit of plaintiff's attorney, in which it was stated in substance that said witness was the only one who could establish material facts with respect to her lease and that petitioner refused to answer such questions. Petitioner moved to quash the subpoena on the ground that the lessee was not the only witness who could establish the facts as to the lease as both petitioner and his secretary were also able to do so. The motion was denied and the taking of the deposition of lessee ordered. In their return respondents admit that unless restrained they intend to compel both petitioner and Verna Osborne to comply with the orders and that refusal will be considered a contempt of the court.

The Order as to Petitioner

The petitioner contends that the order directing him to answer all questions, including those which go into the matter of the accounting proper, grants plaintiff the relief she seeks without any proof that she is entitled to it and exceeds the jurisdiction of the court as, in substance, it grants summary relief outside the scope of section 437c, Code of Civil Procedure. The contention is without merit. [1] An action for an accounting, as instituted herein, is a proceeding in equity for the purpose of obtaining a judicial settlement of the accounts of the parties in which proceeding the court will adjudicate the amount due, administer full relief and render complete justice (1 Cal. Jur. 167-169; 1 C. J. S. 662). Petitioner's complaint expressly prays judgment "that defendant pay over to plaintiff all such monies as may be found to belong to plaintiff and for such other, further and different relief as, the premises considered, is proper." [2] The taking of a deposition is only a provisional measure intended to secure the evidence by which the justice of a litigant's claim or defense may be

established (*San Francisco Gas & Electric Co.* v. *Superior Court*, 155 Cal. 30, 35 [99 P. 359, 17 Ann. Cas. 933]). It in no way disposes of the action itself or grants any of the final relief prayed for and therefore has no resemblance whatever to the summary judgment under section 437c, Code of Civil Procedure.

[3] There can be no doubt that the court in this case had jurisdiction to order petitioner to answer all questions put to him including those pertinent to the accounting itself. Section 2021, Code of Civil Procedure, provides that in certain enumerated cases among which "1. When the witness is a party to the action," the deposition of a witness in the state may be taken "in an action at any time after the service of the summons or the appearance of the defendant." It has been derived from these words that it is not requisite for a deposition to be relevant to an actual issue in the action, but that it is sufficient that it is pertinent to a potential issue (*San Francisco Gas & Electric Co.* v. *Superior Court, supra,* at page 34; *McClatchy Newspapers* v. *Superior Court,* 26 Cal.2d 386, 395 [159 P.2d 944]). With respect to the exact point here presented *Most* v. *Superior Court,* 25 Cal.App.2d 394, 398 [77 P.2d 532] states:

"In the instant case, it is clear that the question of an accounting is raised as a potential, if not an actual, issue of fact, and such being the case, it is evident, upon the authority of *San Francisco Gas & Elec. Co.* v. *Superior Court, supra,* that section 2021 of the Code of Civil Procedure is broad enough in its express terms to include the case now before us, and to confer upon the superior court the right to compel petitioner to answer questions pertinent and material to the *possible* issue of an accounting, which, under the pleadings, at least *may* arise."

[4] Our holding that the court below had jurisdiction to make the order with respect to petitioner's deposition is decisive against granting of a writ of prohibition as to that order (Code Civ. Proc., § 1102; *Rescue Army* v. *Municipal Court,* 28 Cal.2d 460, 463 [171 P.2d 8].) Nevertheless we would have authority to grant other appropriate relief if the facts before us showed the necessity of our intervention. (*Caminetti* v. *Superior Court,* 16 Cal.2d 838, 848 [108 P.2d

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911]; *Board of Trustees* v. *State Board of Equalization*, 1 Cal.2d 784, 787 [37 P.2d 84, 96 A.L.R. 775]), for instance if the making of the order constituted an abuse of discretion requiring relief (*Hays* v. *Superior Court*, 16 Cal.2d 260, 262 [105 P.2d 975]). In *Patrick Farms Inc.* v. *Superior Court*, 13 Cal.App.2d 424 [56 P.2d 1283], this court held that although in general a litigant is entitled to take a deposition in the cases provided for as a matter of right, the trial court could under certain circumstances defer the issuance of a commission to take a deposition until the question of plaintiff's right to an accounting had first been determined. Possibly there might be circumstances under which the refusal to defer the taking of a deposition until such time might constitute an abuse of discretion. [5] The present case certainly does not present such circumstances. Petitioner's admissions at the taking of his deposition and the deed produced constitute at least a prima facie case for the plaintiff's right to an accounting and even if petitioner should be able to prove that the property in question had remained community property, the worst prejudice which petitioner could suffer would be that he gave the plaintiff, his wife, certain information with respect to their common property to which, in the absence of this litigation, she may not have been entitled. Plaintiff's right to secure evidence may well be considered of greater importance.

The Order With Respect to Verna Osborne

[6] The deposition of a witness, who is not a party to the action can only be taken in certain cases enumerated in section 2021, subsection 2 et seq., Code of Civil Procedure. [7] The affidavit on which the subpoena of the witness Verna Osborne was issued tried to bring the case within section 2021, subsection 6 "When the witness is the only one who can establish facts or a fact material to the issue." In that respect the affidavit stated: "That said Verna Osborne is a necessary and material witness for the plaintiff and is the only one who can establish the terms and conditions and the nature of the lease under which said Verna Osborne, and/or San Francisco Academy of Music, occupies said premises, and the rentals heretofore paid by said Verna Osborne

and/or San Francisco Academy of Music to said defendant herein, and other facts necessary and material to the issues in the above entitled action." It further stated in substance that petitioner had refused to answer questions as to these points, there mentioned in some detail. Petitioner moved to quash the subpoena on the grounds, among others, that the affidavit upon which said subpoena was issued was insufficient in law to authorize the issuance; that plaintiff herself had shown by affidavits in these proceedings that petitioner is a person who can establish the same facts; that the case does not come under section 2021, subsection 6, Code of Civil Procedure, as there are other persons who can establish all the same facts. The notice contains the statement that the motion will be based among other things upon two affidavits served with the notice. These affidavits showed in part, that petitioner and his private secretary Gladys Lehning, both residents of San Francisco could establish the same facts sought to be established by Verna Osborne; that Gladys Lehning had kept all the books and records with relation to the property, the income derived therefrom, and the costs and expenses incident thereto since prior to 1938. These affidavits were filed and discussed before the court but otherwise not expressly introduced in evidence. Plaintiff did not introduce further evidence of any kind to support her contention that Verna Osborne was the only witness who could establish the facts mentioned. Nevertheless, the court denied the motion to quash and ordered the deposition of the witness taken.

Respondents contend that even if the ruling were erroneous it was not in excess of jurisdiction and that therefore prohibition does not lie. *Nelson* v. *Superior Court,* 9 Cal. 2d 729 [73 P.2d 232], cited by petitioner, in which case the writ was granted, and which case respondents do not try to distinguish, is decisive authority against this contention. (See also *Blache* v. *Superior Court,* 35 Cal.App.2d 740, 741 [96 P.2d 970].)

[8] Respondents further contend that even if Verna Osborne could oppose the taking of her deposition petitioner has no standing to do so, but must await introduction of the deposition in evidence. We do not agree. Section 2031,

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Code of Civil Procedure requires service of notice on the adverse party not only of time and place of the taking of a deposition of a witness within the state, but also of a copy of an affidavit, showing that the case is within section 2021, Code of Civil Procedure. The notice of place and time is "for the purpose of enabling him to attend and cross-examine." (Code Civ. Proc., § 2004.) The service of the affidavit is clearly for the purpose of enabling him to oppose the taking of the deposition if it is not shown to be within section 2021. There is no reason why the adverse party in such case should have to go to the trouble and costs of attendance and cross-examination by attorney.

[9] As to the merits of the right to take Verna Osborne's deposition respondents contend that there was no evidence whatever as to other possible witnesses except Verna Osborne before the court, as the affidavits of petitioner were not formally introduced in evidence. We do not see that in a procedure on a noticed motion where the affidavits are referred to in, and filed and served with, the notice of motion, any further formal introduction is required. They are just as much before the court as the notice of motion itself. *Glasser* v. *United States,* 315 U. S. 60 [62 S. Ct. 457, 86 L. Ed. 680], the only authority cited by respondents for their contention, is not in point, as it was there held (at p. 87) that in that federal criminal case affidavits, though introduced, were not acceptable as proof.

[10] However, respondents argue that, even if petitioner's affidavits were before the court, there were before the court conflicting affidavits and those in favor of the prevailing party must then be taken as true. The affidavit of plaintiff's attorney to the effect that the lessee was the only witness who could establish facts as to the lease was insufficient to create a material conflict with the detailed factual affidavit of petitioner and could not be considered a sufficient basis for an order to take a deposition under section 2021, subsection 6, Code of Civil Procedure, as against the opposing affidavits. In *Nelson* v. *Superior Court, supra,* 9 Cal. 2d 731, the Supreme Court points out the distinction between the showing of a fact by affidavit and the mere stat-

ing of it, the distinction between stating a conclusion in the language of the statute and stating the evidentiary facts which prove it, an affidavit containing a mere conclusion without evidentiary facts being insufficient (*Hennessy* v. *Hall*, 14 Cal. App. 759, 763 [113 P. 350]; *Tilton* v. *Russek*, 171 Cal. 731, 736 [154 P. 860]). It is doubtful whether under the rule stated in the Nelson case the mere statement of the conclusion in the affidavit of plaintiff's attorney, even if standing alone, was sufficient to make the showing required by section 2031, Code of Civil Procedure; when opposed by the factual showing of petitioner that both he, as lessor, and Gladys Lehning as the bookkeeper of the property could establish the facts sought to be established by Verna Osborne, this statement of a conclusion alone without any further evidentiary facts to negative the attested knowledge of lessor and his bookkeeper, was insufficient to create a material conflict. Respondents now mention several specific facts which might be within the knowledge of lessee and not within the knowledge of lessor or his bookkeeper. However, the affidavit of plaintiff did not make any showing that the deposition of Verna Osborne was intended to establish such specific facts not within the knowledge of petitioner but rather that it was intended to establish the same facts which plaintiff had wished to establish by the deposition of petitioner but as to which petitioner had refused to answer, a circumstance expressly stated in the affidavit. On the basis of the evidence which was before the court below we must hold that not only Verna Osborne but also petitioner and Gladys Lehning could establish the facts intended to be established by said Verna Osborne.

[11] Respondents argue that the circumstance that the adverse party could establish the same facts as the witness whose deposition is sought to be taken under section 2021, subsection 6, should not prevent the taking of a deposition under that subsection. It is conceivable that a liberal construction of the subsection, taking into consideration the purpose for which the provision was made, may lead to such result (compare the method of interpretation used in

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Golden State Co. v. *Superior Court*, 25 Cal. App. 2d 176 [76 P. 2d 728]). However, we need not decide this point here. In this case the adverse party is not the only witness who can establish the same facts as Verna Osborne and the fact that Gladys Lehning must be held to be also able to establish the facts desired, prevents the application of section 2021, subsection 6, Code of Civil Procedure. Respondents argue that each witness' version as to a fact is different from any other witness' version, and that the deposition of each witness can be taken as he or she is the only witness who can testify as to that version. This interpretation of section 2021 is unacceptable. It does not only eliminate from subsection 6 the word "only," but makes also subsections 2, 3 and 4 superfluous, as in all these cases the deposition of every witness could be taken as of the sole witness to his version of any fact. This is not the system of our statute. Section 2021 permits the taking of depositions of parties or their agents in all cases but restricts the taking of depositions of witnesses not parties to the action to specific cases. The distinction is based on a difference of purpose. The taking of the deposition of a party is always permitted to gather information before trial as to the party's theory of the case and the evidence available for it. The deposition of a witness not a party to the action can only be taken during the pendency of an action to preserve it in cases where the circumstances present a special danger that otherwise his testimony cannot be brought before the court. One of such special circumstances is the one mentioned in subsection 6 where the fact that the witness is the sole one who can establish a certain fact aggravates the danger of loss of proof. The application of the subsection should be restricted to cases where a special relation of the witness to the facts or a material fact gives him unique knowledge. This is not the case where, as here, two possible winesses are in an equal position in that respect. Then the deposition of neither can be taken, because, if one should not be available at the trial, the other remains.

As to the order relating to petitioner's duty to answer questions the petition for a writ of prohibition is denied and the alternative writ discharged; with respect to the order as to the taking of the deposition of the witness Verna Osborne let the peremptory writ of prohibition issue as prayed.

Goodell, J., and Dooling, J., concurred.

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